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The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education

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THE POWER BEHIND THE PROMISE: ENFORCING NO CHILD LEFT BEHIND TO IMPROVE EDUCATION

Abstract: Despite the U.S. Supreme Court's recognition in 1954, in *Brown v. Board of Education*, that education is of paramount importance, six million middle and high school students are still in danger of being left behind. Less than seventy-five percent of eighth graders, fifty percent in urban schools, are graduating from high school within five years. Advocates for educational equity have appealed to the courts, achieving limited success. They have also turned to the legislature, which most recently enacted the No Child Left Behind Act of 2001 ("NCLB"). Thus far, however, the federal government has not enforced NCLB adequately. This Note argues that to protect the benefits NCLB confers upon them, parents of children attending failing schools must explore their options for private enforcement. Given the Court's decisions within the past three years narrowing implied private right of action and § 1983, the most promising theory for enforcement of NCLB is third-party beneficiary theory.

INTRODUCTION

> *Education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*[1]

Despite the U.S. Supreme Court's recognition in 1954, in *Brown v. Board of Education*, that education is of paramount importance, six million middle and high school students are still in danger of being left behind.[2] This problem is particularly pronounced for students attending high-poverty schools.[3] Approximately twenty-five percent of

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[1] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[2] *See id.*; SCOTT JOFTUS, ALLIANCE FOR EXCELLENT EDUC., EVERY CHILD A GRADUATE: A FRAMEWORK FOR AN EXCELLENT EDUCATION FOR ALL MIDDLE AND HIGH SCHOOL STUDENTS 1 (Sept. 2002), *available at* http://www.all4ed.org/publications/EveryChildAGraduate/every.pdf. The number of children at risk may actually be higher. *See* 148 CONG. REC. H6780 (daily ed. Sept. 30, 2002) (statement of Rep. Visclosky).

[3] *See* JOFTUS, *supra* note 2, at 1.

high school students are reading at "below basic" levels; in high-poverty schools, this number may rise to over seventy percent.[4] Although standardized test scores of fourth and eighth graders have increased in mathematics, geography, and U.S. history, scores of twelfth graders are either declining or showing little change.[5] Improvement in test scores in the lower grades is not enough; over sixty percent of students in high-poverty schools are scoring below basic levels in math, and almost seventy percent are scoring below basic levels in science.[6] Less than seventy-five percent of eighth graders are graduating from high school within five years.[7] This percentage falls to fifty percent in urban schools.[8] Racial or ethnic minority status and poverty place students at heightened risk of poor educational outcomes at a time when these students are increasing in number.[9]

Disparities in test scores between students of different races and different socioeconomic classes are only one indication that all students are not receiving the same opportunities to learn and achieve.[10] Another indication of lack of educational opportunity is the inequality in per-pupil spending across the country, skewed across race and class lines.[11] Spending is particularly important because inequality of educational resources has been linked to inequality of educational achievement.[12] Despite the Supreme Court's promise in *Brown* that once a state has undertaken to provide its children with an education,

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[4] *See* 146 CONG. REC. S3232 (daily ed. May 2, 2000) (statement of Sen. Gregg); JOFTUS, *supra* note 2, at 1.

[5] *See* 146 CONG. REC. S3235 (daily ed. May 2, 2000) (statement of Sen. Hutchinson); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2003 IN BRIEF 8–10 (Andrea Livingston & John Wirt eds., 2003) [hereinafter CONDITION], *available at* http://nces.ed.gov/pubs2003/2003068.pdf.

[6] 146 CONG. REC. S3232 (statement of Rep. Gregg).

[7] JOFTUS, *supra* note 2, at 1.

[8] *Id.*

[9] *See* 148 CONG. REC. S6050 (daily ed. June 26, 2002) (statement of Sen. Kennedy); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF BLACKS 48 (Sept. 2003), *available at* http://nces.ed.gov/pubs2003/2003034.pdf; NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE SOCIAL CONTEXT OF EDUCATION 1 (July 1997) [hereinafter SOCIAL CONTEXT], *available at* http://nces.ed.gov/pubs97/97981.pdf.

[10] *See* JOFTUS, *supra* note 2, at 1–2 (recognizing that many teachers in low-performing schools are underqualified). See Campaign for Fiscal Equity v. State, 655 N.E.2d 611, 666–67 (N.Y. 1995), *rev'd on other grounds*, 801 N.E.2d 326 (N.Y. 2003), for further elaboration of the term "educational opportunity."

[11] Molly McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 88 (Jay P. Heubert ed., 1999).

[12] *See id.* at 89.

it must do so on equal terms, significant inequalities persist between high-poverty and low-poverty schools.[13] Differences in indicators of educational opportunity such as test scores, graduation rates, physical facilities, curricular and extra-curricular offerings, access to qualified teachers, and funding exemplify these inequalities.[14]

Advocates for educational equity have appealed to the courts, where they have achieved limited success.[15] They have also turned to Congress, which responded by enacting Title I of the Elementary and Secondary Education Act (the "ESEA") in 1965.[16] The most recent enactment of the ESEA is the No Child Left Behind Act of 2001 ("NCLB" or "the Act").[17] NCLB proposes that setting standards and monitoring students, schools, and states in the achievement of these standards will improve the quality of education for all students.[18]

Part I of this Note discusses several legal theories that plaintiffs have advanced in order to press courts to mandate a certain quality of education.[19] Part II introduces NCLB, including its legislative history, and focuses on several provisions of the Act that provide benefits for students and their parents.[20] Part III outlines several theories for private enforcement that plaintiffs have used successfully to secure benefits conferred by other public programs.[21] Part IV explores the potential of NCLB for improving education.[22] It applies the legal theories discussed in Part III to the context of NCLB and concludes that third-party beneficiary theory is most likely to succeed in enforcing the statute.[23]

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[13] *See* 347 U.S. at 493. *See generally* SOCIAL CONTEXT, *supra* note 9 (examining differences between high- and low-poverty schools).

[14] *See generally* SOCIAL CONTEXT, *supra* note 9. For the purposes of this Note, "educational opportunity" refers to these indicators, and "educational equity" refers to equal access to educational opportunity. *See generally* McUsic, *supra* note 11 (providing a more detailed discussion of these topics).

[15] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); Peter W. v. San Francisco, 131 Cal. Rptr. 854, 855 (Ct. App. 1976).

[16] Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. § 6301 (2002)).

[17] Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. § 6301).

[18] *See* GEORGE W. BUSH, NO CHILD LEFT BEHIND 3, *available at* http://www.whitehouse.gov/news/reports/no-child-left-behind.pdf (last visited Apr. 6, 2004).

[19] *See infra* notes 24–51 and accompanying text.

[20] *See infra* notes 52–114 and accompanying text.

[21] *See infra* notes 115–214 and accompanying text.

[22] *See infra* notes 215–309 and accompanying text.

[23] *See infra* notes 215–309 and accompanying text.

I. Using the Courts to Enforce Equity in Education

Faced with the contradiction between the U.S. Supreme Court's pronouncement that education must be available to all students on equal terms and the reality that many urban students face, advocates for educational equity have turned to the court system for assistance.[24] The pursuit of quality education for all students has taken the form of lawsuits premised on several different theories, including constitutional law and educational malpractice.[25] Constitutional law claims have succeeded to some degree, but educational malpractice plaintiffs have not been successful in the public school context.[26]

A. *The Limited Success of Constitutional Claims in Achieving Educational Equity*

Since the 1970s, many lawsuits for educational equity have focused on funding disparities among school districts as indicative of lack of equal educational opportunity.[27] Animating these lawsuits is the theory that without sufficient funding, high-poverty schools cannot educate students adequately.[28] Early lawsuits for educational equity succeeded in challenging the constitutionality of state education-financing systems, in state courts, under the Federal Equal Protection

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[24] *See* Kevin P. McJessy, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 Nw. U. L. Rev. 1768, 1773 (1995).

[25] See *infra* notes 27–49 and accompanying text for further discussion of constitutional claims and educational malpractice claims. Plaintiffs have also advanced common-law theories of recovery under misrepresentation and breach of contract. *See, e.g.*, Brown v. Compton Unified Sch. Dist., 80 Cal. Rptr. 2d 171, 171 (Ct. App. 1998); Paladino v. Adelphi Univ., 454 N.Y.S.2d 868, 869–70 (App. Div. 1982). A detailed discussion of these claims is beyond the scope of this Note, but readers may consult John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 Wash. L. Rev. 349 (1992) or Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU Educ. & L.J. 485 (2003) for further information. Frequently, claims brought under state constitutions or statutes have been denied for the same policy reasons as have common-law claims. *See, e.g.*, D.S.W. v. Fairbanks No. Star Borough Sch. Dist., 628 P.2d 554, 556 (Alaska 1981); Peter W. v. San Francisco, 131 Cal. Rptr. 854, 860–61 (Ct. App. 1976). *But see* B.M. v. State, 649 P.2d 425, 427 (Mont. 1982) (allowing educational malpractice claims to go forward based on state statutory duty of care).

[26] *See supra* note 25 and accompanying text. See *infra* notes 29–49 and accompanying text for further discussion.

[27] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4–5 (1973); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 725 (Tex. 1995); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 190 (Ky. 1989).

[28] *See, e.g.*, *Rodriguez*, 411 U.S. at 4–5; *Edgewood*, 917 S.W.2d at 725; *Rose*, 790 S.W.2d at 190; *see also* McUsic, *supra* note 11, at 89.

Clause of the Fourteenth Amendment.[29] In 1973, however, in *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court declined to find a federal constitutional right to education protected under the Equal Protection Clause.[30] In *Rodriguez*, parents of children attending schools in an urban district brought a class action lawsuit on behalf of minority and poor students residing in school districts with low property tax bases.[31] The Court applied rational basis scrutiny in upholding the Texas system of financing education, finding that no fundamental right existed to justify application of strict scrutiny.[32]

No claimant since *Rodriguez* has asserted a federal constitutional right to education successfully.[33] As a result, plaintiffs have challenged school financing under education and equal protection clauses of state constitutions.[34] Despite several court decisions in plaintiffs' favor, in most states a district's property wealth continues to be linked to per-student spending.[35] Districts with little property wealth have lower tax bases, and therefore, less money to spend on schools.[36] This inequality of educational resources corresponds to inequality of educational achievement.[37] Given current gaps in performance on many measures of adequacy, it is clear that even successful lawsuits premised on state constitutional guarantees have not resulted in equitable education.[38]

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[29] *See* Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 285 (W.D. Tex. 1971), *rev'd*, 411 U.S. at 1; Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971).

[30] 411 U.S. at 35.

[31] *Id.* at 4–5.

[32] *See id.* at 35.

[33] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (stating that education is not a right guaranteed by the U.S. Constitution). *But cf.* Kardmas v. Dickinson Pub. Sch, 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting) (referring to *Rodriguez* as having left open the question of whether a deprivation of access to a minimally adequate education would violate a fundamental constitutional right); Papasan v. Allain, 478 U.S. 265, 285 (1986) (observing that the Court has not determined definitively that a minimally adequate education is not a fundamental right).

[34] *See, e.g.*, *Edgewood*, 917 S.W.2d at 726; Abbot v. Burke, 575 A.2d 359, 363 (N.J. 1990); *Rose*, 790 S.W.2d at 215. A detailed discussion of school finance litigation is beyond the scope of this Note, but readers may want to consult Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475 (App. Div. 2001) for further discussion.

[35] *See Edgewood*, 917 S.W.2d at 726; 148 CONG. REC. S6050 (daily ed. June 26, 2002) (statement of Sen. Kennedy); *see also* WILLIAM HUSSAR & WILLIAM SONNENBERG, TRENDS IN DISPARITIES IN SCHOOL DISTRICT EXPENDITURES PER PUPIL 31 (Jan. 2000), *available at* http://nces.ed.gov/pubs2000/2000020.pdf.

[36] *See* McUsic, *supra* note 11, at 88.

[37] *Id.* at 89.

[38] *See Campaign for Fiscal Equity*, 655 N.E.2d at 667; *Rose*, 790 S.W.2d at 218; JOYTUS, *supra* note 2, at 1. *Campaign for Fiscal Equity* and *Rose* provide detailed examples of how courts have defined adequate education. *See Campaign for Fiscal Equity*, 655 N.E.2d at 661, 667; *Rose*, 790 S.W.2d at 212 & n.22.

B. *The Failure of Educational Malpractice to Achieve Educational Equity*

In addition to constitutional claims, plaintiffs have alleged educational malpractice.[39] Generally, professional malpractice has been defined as failure to exercise the skills required for one's job.[40] A successful malpractice suit requires plaintiffs to show that the defendants owed them a duty of care, that the defendants breached this duty of care, and that they suffered injury from this breach of duty.[41] For the most part, educational malpractice plaintiffs have not succeeded in recovering under this theory.[42]

The failure of educational malpractice as a tort is due largely to the absence of agreement on whether educators owe students a duty of care, and if so, how to measure whether educators have met this duty.[43] This concern arose in the first adjudication of an educational malpractice case.[44] In 1976, in *Peter W. v. San Francisco Unified School District*, the California Court of Appeals held that a public school student may not sue school administrators for providing an inadequate education.[45] The plaintiff, who graduated from high school unable to read above the fifth-grade level, asserted that he had not been educated adequately because of the negligence of the defendant school district, its agents, and employees.[46] The court denied recovery based on the plaintiff's inability to demonstrate that defendants owed him a duty of care.[47] The court also noted that because of conflicting theories of pedagogy, the absence of acceptable standards of care, and the potential for burdensome litigation, it would abstain from imposing liability on public policy grounds.[48] The court's holding in *Peter W.*, that educators owe no duty of care to students, as well as its decision

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[39] *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 412 (7th Cir. 1992); *Fairbanks*, 628 P.2d at 555; *Peter W.*, 131 Cal. Rptr. at 855.

[40] Culhane, *supra* note 25, at 371.

[41] *See* PROSSER AND KEETON ON THE LAW OF TORTS § 30 (W. Page Keeton ed., 5th ed. 1984).

[42] *See, e.g.*, Ross v. Creighton Univ., 740 F. Supp. 1319, 1327 (N.D. Ill. 1990) ("Educational malpractice is a tort theory beloved of commentators, but not of courts."), *overruled on other grounds*, 957 F.2d at 417; *Compton Unified Sch. Dist.*, 80 Cal. Rptr. 2d at 172; *Peter W.*, 131 Cal. Rptr. at 861.

[43] *See* Hunter v. Bd. of Educ., 439 A.2d 582, 584 (Md. 1982); *Fairbanks*, 628 P.2d at 556; *Peter W.*, 131 Cal. Rptr. at 861.

[44] *See Peter W.*, 131 Cal. Rptr. at 861.

[45] *Id.* at 855.

[46] *Id.* at 856.

[47] *See id.* at 858.

[48] *See id.* at 860–61.

to abstain from imposing liability for public policy reasons, has been widely followed to deny recovery for educational malpractice.[49]

Because lawsuits have failed to realize equal educational opportunity for all students, advocates have explored other avenues to achieve this goal.[50] In particular, advocates have turned to the federal legislative process to achieve educational equity.[51]

II. THE NO CHILD LEFT BEHIND ACT OF 2001

> *From this day forward, all students will have a better chance to learn, to excel, and to live out their dreams.*[52]

Despite efforts to achieve equity in education through lawsuits alleging constitutional violations and educational malpractice, schools have failed to improve.[53] Poor minority students in large urban districts continue to bear the brunt of this failure.[54] At the same time that advocates were appealing to the courts to improve education, they were pushing the federal government to enact legislation to accomplish this goal.[55] The No Child Left Behind Act of 2001 ("NCLB" or "the Act") is the most recent federal legislative effort to improve educational equity.[56]

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[49] *See Peter W.*, 131 Cal. Rptr. at 861; *see, e.g.*, *Fairbanks*, 628 P.2d at 556; Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979).

[50] *See infra* notes 52–114 and accompanying text.

[51] *See infra* notes 52–114 and accompanying text.

[52] Statement by President of the United States (Jan. 8, 2002), 2002 U.S.C.C.A.N. 1614, 1615 [hereinafter Statement].

[53] *See* JOFTUS, *supra* note 2, at 7–11; HOUSE EDUC. & THE WORKFORCE COMM., H.R.1 CONFERENCE REPORT SUMMARY: PRESIDENT BUSH'S NO CHILD LEFT BEHIND EDUCATION REFORM BILL, *at* http://edworkforce.house.gov/issues/107th/education/nclb/confreptsum.htm (Dec. 10, 2001, updated Oct. 2002) [hereinafter CONFERENCE REPORT SUMMARY]; INDEP. REVIEW PANEL (IRP), IMPROVING THE ODDS: A REPORT ON TITLE I FROM THE INDEPENDENT REVIEW PANEL 2 (2001), *available at* http://www.ctredpol.org/pubs/improvingodds reporttitlei_irp/improvingoddsreporttitleipanel.pdf.

[54] *See* CONFERENCE REPORT SUMMARY, *supra* note 53; Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1014 (2001); *The Achievement Gap*, EDUC. WEEK, Jan. 21, 2004, at 16, *available at* http://www.edweek.org/ew/ewstory.cfm?slug=19Brown-b1.h23&keywords=The%20Achievement%20Gap.

[55] See *infra* notes 56–62 and accompanying text for further discussion of legislation aimed at improving educational opportunity for disadvantaged students.

[56] Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. § 6301 (2002)). The final regulations were issued by the Department of Education and published on December 2, 2002. 34 C.F.R. § 200 (2002).

A. *NCLB and Its Provisions*

Title I of the Elementary and Secondary Education Act (the "ESEA") was adopted in 1965 to aid disadvantaged students.[57] Title I provided federal funds as supplementary aid tied directly to eligible students, who were selected based on test scores.[58] In its first thirty years, Title I aimed to bring economically disadvantaged children up to basic levels of achievement and did not achieve even that modest objective.[59] In 1994, Congress revised the ESEA by passing the Improving America's Schools Act of 1994.[60] Improving America's Schools revised the ESEA's focus on the attainment of basic skills for poor children and imposed a requirement of high standards for all students.[61] By 2001, however, the academic gap between rich and poor, white and non-white students, not only existed, but was growing wider.[62]

When President George W. Bush signed NCLB on January 8, 2002, he touted it as the beginning of a new era.[63] NCLB aims to ensure excellence and equity in educational achievement for all students by narrowing the achievement gap between disadvantaged students and their affluent peers.[64] Its main provisions seek to increase flexibility for states and school districts, fund research-based programs and practices, empower parents, and increase accountability for student performance by rewarding and sanctioning districts and schools based on students' academic achievement.[65]

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[57] *See* Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. § 6301); Peter Zamora, Note, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effects Upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL'Y 413, 424 (2003).

[58] *See* Pub. L. No. 89-10 § 201, 79 Stat. 27; IRP, *supra* note 53, at 2.

[59] *See* 146 CONG. REC. S3232 (daily ed. May 2, 2000) (statement of Sen. Gregg); IRP, *supra* note 53, at 2–3.

[60] Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (current version at 20 U.S.C. § 6301); *see also* IRP, *supra* note 53, at 3.

[61] *See* S. Rep. No. 103-292 (1994), LEXIS, 103 S. Rpt. 292; *see also* IRP, *supra* note 53, at 4.

[62] *See Leave No Child Behind: Hearing Before the House Committee on Education and the Workforce*, 107th Cong. 2 (2001) (statement of Rep. John Boehner, Chair, Committee on Education and the Workforce), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:77901.pdf; 147 CONG. REC. E437 (daily ed. Mar. 22, 2001) (statement of Rep. Boehner).

[63] *See* Statement, *supra* note 52, at 1614 ("America's schools will be on a new path of reform and a new path of results.").

[64] *See* 20 U.S.C. § 6301; 147 CONG. REC. H2188 (daily ed. May 16, 2001) (statement of Rep. Ballenger).

[65] *See* BUSH, *supra* note 18, at 2. This Note focuses on several of the many provisions of the Act. *See infra* notes 67–85 and accompanying text. Throughout this Note, the term

NCLB emphasizes stronger accountability.[66] The Act requires, for example, that each state develop a single statewide system of challenging academic content and achievement standards that is consistent with professionally recognized standards.[67] Each state's educational agency must then implement annual testing designed to measure all students' achievement of the standards.[68] The tests must be aligned with the state's standards and may be used only for purposes for which they are valid and reliable.[69] States must then report test results annually to the public, disaggregated within every state, district, and school by gender, race, ethnicity, English proficiency, and migrant status, to enable comparisons among these groups.[70] The Act requires that by the end of the 2013–2014 school year, all students in each group meet proficiency on academic achievement, as defined by the state and determined by performance on the state assessment.[71] To meet this goal, school-wide programs must include activities to assist students who are experiencing difficulty mastering the proficient or advanced levels of academic achievement standards.[72]

In order to hold schools accountable, NCLB provides that students will not be trapped in schools that fail to make progress toward the goal of proficiency for all students.[73] States are required to establish statewide proficiency and progress objectives that will enable all students to reach proficiency by the target date of 2014.[74] States must sanction schools that fail to meet targets by imposing increasing de-

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"school district" includes "local educational agency," as used in NCLB. *See, e.g.*, 20 U.S.C. § 6301.

[66] See *infra* notes 67–85 and accompanying text for further discussion.

[67] 20 U.S.C. § 6311(b)(3)(C)(i)–(ii).

[68] *See id.* Students are to be assessed at least once per period during grades 3 through 5, 6 through 9, and 10 through 12, in mathematics and reading/language arts and, beginning in 2007–2008, in science. *Id.* § 6311(b)(3)(C)(v).

[69] *Id.* § 6311(b)(3)(C)(ii)–(iii).

[70] *Id.* § 6311(b)(3)(C)(xiii), (h)(1)(C)(i)–(ii).

[71] *Id.* § 6311(b)(2)(F).

[72] *See* 20 U.S.C. § 6314(b)(1)(I) (providing that effective, timely additional assistance to struggling students shall include identification of the difficulties and sufficient information on which to base effective assistance).

[73] *See* 147 CONG. REC. H1179 (daily ed. Mar. 27, 2001) (statement of Rep. Keller) (characterizing transfer and supplemental services options as a "safety valve" for students trapped in "persistently failing schools"); BUSH, *supra* note 18, at 7.

[74] 20 U.S.C. § 6311(b)(2)(E)–(H). NCLB defines Adequate Yearly Progress ("AYP") as targeted increments that a school or school district must reach on a yearly basis in order to demonstrate by 2014 that one-hundred percent of all students participating in assessments have achieved proficiency. *See id.*

grees of corrective action.[75] After a school has failed to make adequate yearly progress ("AYP") for two consecutive years, parents have the unqualified right to transfer their children to another district school that is not in need of improvement.[76] If the district does not have an acceptable school, parents have a qualified right to transfer children to schools run by other local educational agencies in the area.[77] Parents must be informed of this right no later than the first day of the school year following such identification, and priority is given to the lowest-achieving students from low-income families.[78] If the school fails to make AYP the following year, parents must again be notified, and they may continue to transfer their children as above, or they may, instead, receive supplemental services free of charge.[79] Taken together, these provisions give students the right to attend a school that is making AYP.[80]

Students and parents receive additional rights under NCLB.[81] Students who attend a "persistently dangerous" school or become victims of violent crime on school grounds are permitted to transfer to a safe school within the school district.[82] Under NCLB, parents also have the right to be involved meaningfully in planning and implementing all programs assisted by NCLB.[83] The Act contains additional notice provisions to keep parents apprised of how well their children's schools are meeting the requirements imposed by NCLB.[84] States must also make

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[75] *See id.* § 6316.

[76] *Id.* § 6316(b)(1)(E).

[77] *Id.* § 6316(b)(11). This right is qualified in that NCLB directs school districts in this situation, to the extent practicable, to establish a cooperative agreement with other local educational agencies. *Id.* If school districts are unable to establish such an agreement, students may not be able to transfer. *See id.*

[78] *Id.* § 6316(b)(6), (b)(1)(E)(ii).

[79] 20 U.S.C. § 6316(b)(6), (b)(8)–(10), (e). If the school fails to make adequate progress for a fourth year, the district must implement corrective actions, such as replacing staff or changing the curriculum, and after a fifth year, the school would be identified for reconstitution, and required to alter its governance structure. *See id.*; Erik Robelen, *An ESEA Primer*, EDUC. WEEK, Jan. 9, 2002, at 28, *available at* http://www.edweek.org/ew/ew_printstory.cfm?slug=16eseabox.h21.

[80] *See* 20 U.S.C. §§ 6311(b)(2)(E)–(H), 6316; 147 CONG. REC. H1179 (daily ed. Mar. 27, 2001) (statement of Rep. Keller).

[81] *See infra* notes 82–85 and accompanying text.

[82] *See* 20 U.S.C. § 7912.

[83] *See id.* § 6318(a)(2), (c)–(e); *see also* Paul Weckstein, *Enforceable Rights to Quality Education*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 306, 330 (Jay P. Heubert ed., 1999) (characterizing parent involvement requirements of Title I as "substantial, detailed rights").

[84] 20 U.S.C. § 6311(h)(1)(B)(ii), (h)(1)(C)(vii)–(viii), (h)(2)(B), (h)(2)(E) (requiring states and school districts to keep parents informed of their progress toward requirements

available to the public, through annual report cards, information on their progress toward NCLB objectives.[85]

B. *Legislative History and Public Perceptions of NCLB*

The legislative history of NCLB, as well as the publicity that surrounded its passage, emphasizes a new federal role in education, one which places children at the center.[86] Its purpose is to ensure educational opportunity for all children.[87] Donald Payne, who worked on NCLB as a member of the House Committee on Education and the Workforce in the 107th Congress, wrote an article about the process.[88] Payne describes the Act as targeting federal funds to needy communities and empowering parents by requiring that they be informed about school quality and be involved with school plans.[89]

The White House and members of Congress assert that NCLB contains several important provisions for the improvement of education.[90] It increases the amount of resources available and targets disadvantaged areas.[91] NCLB makes schools accountable by establishing

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including AYP and the requirement imposed by § 6319(a)(3) that all public school teachers be highly qualified by the end of the 2005–2006 school year). Section 6312(g)(1)(A) requires that parents be notified if a child has been identified as limited English proficient and will be placed in a language instruction education program, and § 6312(g)(1)(A)(viii)(aa) gives parents the right to remove their child from this program, once informed. *See id.* § 6312(g)(1)(A).

[85] *See id.* § 6311(h)(2)(E).

[86] *See* 147 CONG. REC. E929 (daily ed. May 24, 2001) (statement of Rep. Rogers); 146 CONG. REC. S3233 (daily ed. May 2, 2000) (statement of Sen. Gregg) ("[This] is a debate over the fundamental question of how we improve education for our children, and specifically for our low-income children."); BUSH, *supra* note 18 ("The federal role in education is not to serve the system. It is to serve the children[.]"). *But see* 147 CONG. REC. E976 (daily ed. May 25, 2001) (statement of Rep. Rangel) (suggesting that the focus of the bill is America's economic growth and linking the education of America's poor to the country's economic future).

[87] 20 U.S.C. § 6301; *see* 149 CONG. REC. S194 (daily ed. Jan. 10, 2003) (statement of Sen. Gregg) ("[T]he purpose of the bill is to make sure kids learn. . . . They now have a law they can follow which allows them to make sure that kids do learn."); Press Release, Committee on Education and the Workforce, House Speaker J. Dennis Hastert (R-IL) Praises Passage of Education Reform (Dec. 13, 2001), http://edworkforce.house.gov/press/press107/hastert121301.htm ("This common-sense education plan is designed to give our children every possible opportunity to learn, succeed in school and go on to college.").

[88] *See generally* Donald Payne, *Reauthorization of the Elementary and Secondary Education Act: Challenges Throughout the Legislative Process*, 26 SETON HALL LEGIS. J. 315 (2002).

[89] *Id.* at 321–22.

[90] See *supra* notes 65–85 and accompanying text and *infra* notes 91–97 and accompanying text for further discussion of these provisions.

[91] *See* H.R. REP. No. 107-063, pt. 1, at 1242 (2001), http://www.congress.gov/cgi-bin/cpquery/R?cp107:FLD010:@1(hr063).

timelines for achievement of objectives and consequences for failure to meet these objectives.[92] Schools and school districts also become more accountable because of NCLB's requirements of parent notification and publication of annual report cards demonstrating progress, or lack thereof.[93] NCLB offers parents educational options, freeing their children from persistently failing schools.[94] NCLB helps to focus attention on the achievement gap between disadvantaged groups and their more advantaged peers by requiring collection of disaggregated data and reporting that enables comparisons.[95] It enhances local control over education by giving states the flexibility to transfer up to fifty percent of federal Title I funding within Title I programs, as well as the ability to design their own standards and systems of assessment.[96] Finally, it represents a significant commitment of federal dollars to education.[97]

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[92] *See* 147 CONG. REC. E2327 (daily ed. Dec. 19, 2001) (statement of Rep. Frelinghuysen); BUSH, *supra* note 18, at 3.

[93] *See* 147 CONG. REC. E2327; BUSH, *supra* note 18, at 2–3; *see also* Ellen R. Delisio, *Paige, Kennedy on No Child Left Behind Act*, Educ. World, *at* http://www.educationworld.com/a_issues/issues309.shtml (May 2, 2002) (explaining that NCLB provides more educational and financial accountability because it provides parents with more information about schools).

[94] *See, e.g.*, WHITE HOUSE, FACT SHEET: NO CHILD LEFT BEHIND ACT, *at* http://www.whitehouse.gov/news/releases/2002/01/20020108.html (Jan. 2002) [hereinafter FACT SHEET]. For further elaboration of parents' rights, see JOHN BOEHNER & JUDD GREGG, TITLE I RESOURCES FOR REFORM: NEW HOPE FOR AMERICA'S MOST DISADVANTAGED PUBLIC SCHOOLS 6 (July 9, 2002), *available at* http://edworkforce.house.gov/issues/107th/education/nclb/boehnergreggreport.pdf.

[95] *See* H.R. REP. No. 107-063, *supra* note 91, at 1242; Press Release, House-Senate Education Conference Report: *No Child Left Behind* (revised Dec. 12, 2001), http://www.ed.gov/news/pressreleases/2001/12/12112001b.html. *But see* Thomas Toch, *Bush's Big Test*, WASH. MONTHLY, Nov. 2001, at 12, 16 (stating that the smaller size of these subgroups exacerbates problems in the use of testing to determine which schools are in need of improvement, because of regular fluctuations in test scores from year to year).

[96] *See, e.g.*, 147 CONG. REC. E2329–30 (daily ed. Dec. 19, 2001) (statement of Rep. Petri); BOEHNER & GREGG, *supra* note 94, at 5–6; FACT SHEET, *supra* note 94.

[97] *See* HOUSE EDUC. & THE WORKFORCE COMMITTEE, FACT SHEET: FY 2004 APPROPRIATIONS, KEEPING EDUCATION AMONG THE HIGHEST PRIORITIES, EVEN IN A TIME OF ECONOMIC UNCERTAINTY AND FISCAL RESTRAINT (July 23, 2003), *at* http://edworkforce.house.gov/issues/108th/education/nclb/factsheet072303.htm; HOUSE EDUC. & THE WORKFORCE COMMITTEE, FACT SHEET: NO CHILD LEFT BEHIND: SPENDING MORE THAN EVER—AND EXPECTING MORE THAN EVER (July 23, 2003), *at* http://edworkforce.house.gov/issues/108th/education/nclb/factvfiction072303.htm [hereinafter SPENDING]. *But see* 149 CONG. REC. S100 (daily ed. Jan. 9, 2003) (statement of Sen. Durbin) (stating that President Bush proposed only a 3.6% increase in funding of the ESEA, which Congress increased to 20%).

Not everyone, however, believes that NCLB represents a positive step toward educational equity.[98] The Act has garnered much criticism, particularly for its overemphasis on testing.[99] Numerous educators and politicians have attacked NCLB's focus on testing as the primary assessment of schools' progress, asserting that testing does not tell the whole story, that it prompts teachers to "teach to the test," thereby giving other aspects of the curriculum short shrift, and that it leads to the loss of time that could be spent on other educational activities.[100] Opponents contend that NCLB is structured to provide incentives for states to create lower standards and easier tests so that it is easier to show progress.[101] Furthermore, they suggest it provides incentives for schools to allow underperforming students to drop out of school, rather than expend resources attempting to educate them.[102]

Finally, the major criticism leveled at NCLB is that it is an unfunded mandate.[103] It requires that states participate in annual testing

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[98] See *infra* notes 99–107 and accompanying text for further discussion of criticism of NCLB.

[99] See *infra* notes 100–102 and accompanying text for further discussion of criticism of NCLB's focus on testing.

[100] *See, e.g.*, H.R. REP. NO. 107-063, *supra* note 91, at 1240 ("[W]e remain concerned that the bill goes too far in its reliance on standardized testing."); 147 CONG. REC. H137 (daily ed. Jan. 31, 2001) (statement of Rep. Underwood) ("I am concerned about the overreliance of testing as the only measure of educational successes. . . . [W]e must think about other ways to measure the school environment . . . ."); Toch, *supra* note 95, at 14. *But cf.* SPENDING, *supra* note 97 (quoting President Bush as saying that "if you're teaching to the test, and the test is designed to confirm that children are making progress in reading and math, that's the whole idea.").

[101] *See* SPENDING, *supra* note 97 (asserting that NCLB provides states with enough money to administer the required federal testing, but acknowledging that testing costs could be higher if states choose to design and implement more intricate testing systems than those required under the bill); Toch, *supra* note 95, at 15; Press Release, Committee on Education and the Workforce, Boehner Backs Secretary Paige's Strong Stand on State Education Standards (Oct. 23, 2002), http://edworkforce.house.gov/press/press107/paigeletter102302.htm (noting that some states have lowered standards and expectations to hide the low performance of their schools or to remove schools from lists of low performers).

[102] *See* Nat'l Educ. Ass'n (NEA), *No Child Left Behind?*, NEA TODAY, May 2003, http://www.nea.org/neatoday/0305/cover.html. NCLB has also been charged with leaving behind bilingual students. *See, e.g.*, 147 CONG. REC. E1143 (daily ed. June 19, 2001) (statement of Rep. Rodriguez); 147 CONG. REC. E992 (daily ed. May 25, 2001) (statement of Rep. Pastor). Many critics also claim that NCLB is only the first step in privatizing public education, a goal they believe is at the heart of the bill, because of its transfer and mandated corrective-action provisions. *See, e.g.*, 148 CONG. REC. S8151 (daily ed. Sept. 4, 2002) (statement of Sen. Kennedy).

[103] *See* 149 CONG. REC. S100 (daily ed. Jan. 9, 2003) (statement of Sen. Durbin). *But see* SPENDING, *supra* note 97 (asserting that NCLB is neither unfunded, nor a mandate; the bill did not promise a particular amount of money, and states are free to opt out of receiving federal education funds).

using the federally designed National Assessment of Educational Progress, as well as design their own standards and testing systems, without appropriating sufficient money for these tasks.[104] Although President Bush cites increased spending on education, critics assert that the money promised has never been delivered.[105] Members of the 107th Congress expressed their concern regularly over passing NCLB, then underfunding it.[106] Concern has continued into the 108th Congress, where bills have been introduced to forestall requirements that schools and states comply with NCLB until it is fully funded.[107]

C. *The Future of NCLB*

Despite NCLB's alleged shortcomings and one commentator's claim that the Act is unconstitutional, it appears that NCLB is here to stay.[108] In 2003, in *Kegerreis v. United States*, the Federal District Court for the District of Kansas declined to hold NCLB unconstitutional.[109] The court dismissed the lawsuit, finding that sovereign immunity prevented the plaintiff, a public school teacher, from suing the United States.[110] The court declined to substitute the Secretary of the Department of Education as the defendant, finding that the plaintiff had not articulated how NCLB violated his constitutional rights.[111]

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[104] *See* 147 CONG. REC. E1143 ("In the name of accountability, more testing will be mandated with little financial support from the federal government."). *But see* SPENDING, *supra* note 97 (stating that several studies show the federal government is giving states more than enough money to pay for the testing required by NCLB).

[105] *See* NEA, *supra* note 102; David E. Sanger, *Bush, at School, Promotes Education Bill*, N.Y. TIMES, May 7, 2002, at A18. *But see* SPENDING, *supra* note 97 (asserting that NCLB does not impose any overall funding levels for fiscal year 2003 or beyond; it only authorizes Congress to spend "such sums as may be required" overall to implement education reforms authorized or promised by NCLB). Where there are specific funding levels, they are only spending caps, not promises. *See id.*

[106] *See, e.g.*, 148 CONG. REC. E1561 (daily ed. Sept. 12, 2002) (statement of Rep. Moore); 148 CONG. REC. S4341 (daily ed. May 15, 2002) (statement of Sen. Durbin). Senator Kennedy, initially a sponsor of the bill, has expressed concern repeatedly with continued failures to fund it at acceptable levels. *See, e.g.*, 148 CONG. REC. S8151.

[107] *See, e.g.*, 149 CONG. REC. E2448 (daily ed. Nov. 23, 2003) (statement of Rep. Schiff); 149 CONG. REC. H3766 (daily ed. May 8, 2003) (statement of Rep. Etheridge).

[108] *See* Kegerreis v. United States, No. 02-2232, 2003 U.S. Dist. LEXIS 18012, at *8 (D. Kan. Oct. 9, 2003); Ronald D. Wenkart, *The No Child Left Behind Act and Congress' Power to Regulate Under the Spending Clause*, 174 EDUC. LAW REP. 589, 597 (2003) (suggesting that several provisions of NCLB exceed Congress's Spending Clause powers).

[109] 2003 U.S. Dist. LEXIS 18012, at *8.

[110] *Id.* at *3–6, *8.

[111] *Id.* at *7.

Assuming NCLB is constitutional, it may mirror the ESEA in failing to attain its intended beneficial effects because it provides for relatively weak federal oversight.[112] It remains to be seen how firm the federal government will be in requiring states and school districts to adhere to NCLB.[113] For this reason, the students and parents for whom NCLB provides benefits may need to explore options for private enforcement of the Act.[114]

III. Theories for Enforcement of Benefits Conferred by Public Programs

In light of the failures of lawsuits premised on constitutional violations and educational malpractice to achieve educational equity, plaintiffs and their advocates may consider using legislation, such as NCLB, to achieve this end.[115] NCLB aims to improve educational opportunity

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[112] *See* S. Rep. No. 107-7, at 151 (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_reports&docid=f:sr007.107.pdf (stating that there is no federal oversight of the quality of tests chosen by states); Bush, *supra* note 18, at 8 (explaining that states select and design their own assessments).

[113] *See* William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. Rev. 1751, 1759–60 (2003) (discussing the Department of Education's "culture of nonenforcement"); Catherine Gewertz, *Tutoring Aid Falling Short of Mandate*, Educ. Week, Feb. 25, 2004, at 1 (stating that many students eligible for tutoring services are not receiving them); Mary Leonard, *Schools Reported Lagging New Law*, Boston Globe, Jan. 4, 2003, at A3 (noting that states are moving slowly in providing parents of students in underperforming schools with supplemental educational services or school choice); Lynn Olson, *Data Doubts Plague States, Federal Law*, Educ. Week, Jan. 7, 2004, at 1 (indicating that many states have given schools leeway in meeting progress goals). Many states have failed to meet even the less demanding requirements of the Improving America's Schools Act of 1994, yet no state has lost federal funding as a result of this failure. *See* 147 Cong. Rec. E989 (daily ed. May 25, 2001) (statement of Rep. Jones); Toch, *supra* note 95, at 15 (noting that only seventeen states have implemented the tests required by the Improving America's Schools Act of 1994).

[114] *See* Taylor, *supra* note 113, at 1759–60; Leonard, *supra* note 113, at A3; Toch, *supra* note 95, at 15. The ESEA, NCLB's predecessor, was enforced privately in 1973. *See* Nicholson v. Pittenger, 364 F. Supp. 669, 676 (E.D. Pa. 1973). In 1973, in *Nicholson v. Pittenger*, the Federal District Court for the Eastern District of Pennsylvania enjoined the Secretary of the Pennsylvania Department of Education from granting ESEA Title I funds to the School District of Philadelphia for the 1973–1974 school year, unless the School District could demonstrate that it had met the statute's requirements. *Id.* The plaintiffs, poor parents of children attending School District of Philadelphia schools, alleged that the state had approved Philadelphia's applications for funding without making several determinations required by the statute as conditions of funding. *Id.* at 671. Although the court granted plaintiffs' requests for declaratory judgment and an injunction, it did not explicitly state the legal theory under which it granted relief. *Id.* at 673–76.

[115] *See, e.g.*, Peter W. v. San Francisco, 131 Cal. Rptr. 854, 855 (Ct. App. 1976); *The Achievement Gap*, *supra* note 54, at 16; Condition, *supra* note 5, at 8–10. See *supra* notes

by emphasizing accountability.[116] Thus far, however, the federal government has not enforced NCLB against states and schools that have failed to meet its mandates.[117] If the government continues to give money to states and schools under NCLB without holding them accountable for complying with the Act's provisions, the government may fail to accomplish NCLB's stated objectives.[118] Rather than rely on federal enforcement of NCLB to accomplish these objectives, educational equity plaintiffs may consider private enforcement, looking to legal theories that have been successful in enforcing other public programs.[119]

In the United States, federal grant-in-aid programs grew significantly in the 1960s and 1970s, resulting in an increasing number of beneficiaries who received funds through several different state agencies.[120] The federal agencies that provide grants under federal grant-in-aid programs are usually responsible for ensuring a state's compliance with conditions attached to these grants.[121] In fact, where the federal government provides financial aid, it may enforce attached conditions in several ways, such as denying funds in the future, demanding restitution of sums already paid, or obtaining a judicial mandate that the recipient comply with conditions it has accepted.[122] Nevertheless, federal agencies' emphases on the preservation of good relationships with state administrators and the maintenance of popular programs often outweigh their concern for individual beneficiaries.[123] Because of these concerns, agencies often do not impose sanctions for failure to meet conditions.[124]

For the benefits secured under grant-in-aid programs to be meaningful, they must be enforceable.[125] Litigants have advanced sev-

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27–49, 63–65 and accompanying text for further discussion of these legal theories and their failure to achieve educational equity.

[116] *See* 147 CONG. REC. E437 (daily ed. Mar. 22, 2001) (statement of Rep. Boehner); Delisio, *supra* note 93.

[117] *See* 147 CONG. REC. E989 (daily ed. May 25, 2001) (statement of Rep. Jones); Leonard, *supra* note 113, at A3; Toch, *supra* note 95, at 15.

[118] *See* 147 CONG. REC. E989; Leonard, *supra* note 113, at A3; Toch, *supra* note 95, at 15.

[119] See *supra* notes 65–85 and accompanying text for discussion of the benefits provided by NCLB.

[120] Bradford C. Mank, *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 HOUS. L. REV. 1417, 1428 (2003).

[121] *Id.* at 1431.

[122] David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 93 (1994).

[123] Mank, *supra* note 120, at 1432.

[124] *Id.* at 1431–32.

[125] See *infra* notes 129–214 for discussion of efforts to enforce benefits secured under grant-in-aid programs.

eral theories to accomplish this end, including implied private right of action, the application of § 1983, and third-party beneficiary theory.[126] Because the courts have limited recovery significantly under implied private right of action and § 1983 theories over the past few years, interest has grown in the enforcement of rights through contract analysis.[127]

A. *The Emergence of Private Right of Action Theory to Enforce Federal Statutes*

Prior to 1964, the U.S. Supreme Court generally refused to enforce a federal statute through a lawsuit if the statute did not authorize private enforcement expressly.[128] In 1964, in *J.I. Case Co. v. Borak*, the Court held that private parties had a cause of action under the Securities Exchange Act for rescission or damages.[129] In *Borak*, a stockholder of J.I. Case Company alleged that a merger effected through the circulation of a misleading proxy statement violated the Securities Exchange Act.[130] Because the statute did not authorize private lawsuits explicitly, the Court's holding recognized an implied cause of action.[131] Between 1964 and 1975, the Court recognized implied private rights of action

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[126] *See* Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967); Mank, *supra* note 120, at 1481. Implied private right of action is characterized as the idea that a court may "find" legislative intent to permit an individual to enforce a federal statute in the absence of express language to that effect. See *infra* notes 129–145 for further discussion of this cause of action. Section 1983 provides the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000).

[127] *See* Mank, *supra* note 120, at 1426–27, 1450 (suggesting that the U.S. Supreme Court has increasingly narrowed its interpretation of implied private rights of action and enforceability of federal statutes through § 1983); Anthony John Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1173 (1985). See *infra* notes 129–214 for further discussion of the use and development of these causes of action.

[128] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 735 (1979) (Powell, J., dissenting); Mank, *supra* note 120, at 1423.

[129] *See* 377 U.S. 426, 430–31 (1964); Mank, *supra* note 120, at 1423.

[130] *See* 377 U.S. at 427.

[131] *See id.* at 432; Mank, *supra* note 120, at 1423.

under a number of statutes, enabling private parties to bring lawsuits to enforce them.[132]

In 1975, in *Cort v. Ash*, the U.S. Supreme Court held that there is no private right of action under 18 U.S.C. § 610, and in doing so, refined implied right of action jurisprudence.[133] The plaintiff, a corporate stockholder, brought an action for damages against corporate directors under this criminal statute.[134] In its opinion, the Court outlined a four-part test for determining whether a private remedy is implicit in a statute: (1) Is the plaintiff part of a class to which the statute intends to provide special status or benefits?; (2) Is there implicit or explicit evidence that Congress intended to create or deny the proposed right of action?; (3) Is allowing a private right of action as an implied remedy for the plaintiff consistent with the underlying purpose of the legislative scheme?; (4) Is the cause of action one traditionally relegated to state law and, thus, in an area where a federal action would intrude on important state concerns?[135] Since 1975, courts have followed this test to decide whether a statute creates an implied private right of action.[136]

In applying the *Cort* test, courts have focused on its second prong—whether significant evidence demonstrates congressional intent to create a private right of action.[137] To prevail under this test, even where a statute creates rights, a plaintiff must also demonstrate intent to create a private remedy.[138] Recently, the Court further narrowed implied private rights of action.[139] In 2001, in *Alexander v. Sandoval*, the Court held that there is no private right of action to enforce

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[132] *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 25 (1976) (reviewing use of implied private right of action theory); Mank, *supra* note 120, at 1423.

[133] *See* 422 U.S. 66, 68–69 (1975).

[134] *See id.* at 68.

[135] *Id.* at 78.

[136] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001); Suter v. Artist M., 503 U.S. 347, 363 (1992); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 17 (1981).

[137] *See, e.g.*, *Alexander*, 532 U.S. at 286, 293 (focusing on Congress's intent and finding no implied private right of action to enforce disparate-impact regulations promulgated under § 602 of Title VI); *Sea Clammers*, 453 U.S. at 13, 14 (focusing on legislative intent and finding no private right of action to enforce violations of the Federal Water Protection Control Act or the Marine Protection, Research, and Sanctuaries Act of 1972); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 18 (1981) (finding no private right of action to enforce the Developmentally Disabled Assistance and Bill of Rights Act because Congress only intended it to be a funding statute).

[138] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979); Mank, *supra* note 120, at 1425.

[139] *See Alexander*, 532 U.S. at 288.

disparate-impact regulations promulgated under Title VI.[140] The plaintiff challenged, under § 602 of Title VI, the Alabama Department of Public Safety's policy of administering driver's license exams only in English.[141] The Court found for the defendant, ruling that the plaintiff had not established congressional intent to create a private right of action.[142] In *Alexander*, the Court narrowed its implied private right of action jurisprudence by limiting its search for Congress's intent to the text and structure of the statute.[143] After *Alexander*, to enforce a federal statute under an implied private right of action theory, a court would have to find from its text and structure that Congress intended to create both a private right and a private remedy.[144] Because of this narrowing construction of implied private rights of action, plaintiffs seeking to enforce statutory rights have increasingly brought actions under § 1983.[145]

B. *The Rise and Fall of § 1983 as a Tool for Enforcing Federal Statutes*

Congress enacted the predecessor of § 1983 in 1871 to protect the civil rights of African-Americans in the South.[146] Section 1983 permits U.S. citizens to bring suit against state action that deprives them of "rights, privileges, or immunities secured by the Constitution and laws . . . ."[147] For over one hundred years, the Court permitted only plaintiffs alleging violations of their constitutional rights to bring § 1983 lawsuits.[148] In 1980, however, in *Maine v. Thiboutot*, the U.S. Supreme Court held that plaintiffs deprived of welfare benefits to which they were entitled under the federal Social Security Act could recover under § 1983.[149] In *Thiboutot*, a family with eight children brought a class action lawsuit challenging Maine's interpretation of the Social Security Act, which decreased their Aid to Families with Dependent Children benefits.[150] In allowing recovery, the Court held that the § 1983 remedy

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[140] *Id.* at 293.

[141] *Id.* at 279.

[142] *See id.* at 288–89, 293 (noting that statutes focusing on the party regulated rather than the party protected create no private right of action, and finding none under this statute).

[143] *See id.* at 288.

[144] *See* 532 U.S. at 288, 293.

[145] *See* Mank, *supra* note 120, at 1426–27.

[146] *See* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (2000)); Mank, *supra* note 120, at 1427.

[147] *See* 42 U.S.C. § 1983. See *supra* note 126 for additional text of § 1983.

[148] *See* Mank, *supra* note 120, at 1428.

[149] *See* 448 U.S. 1, 3–4 (1980).

[150] *Id.* at 2–3.

applied to violations of federal statutes as well as constitutional law.[151] After *Thiboutot*, courts allowed private individuals who were beneficiaries of federal statutory rights to bring suit under § 1983.[152]

In 1981, in *Pennhurst State School & Hospital v. Halderman*, the U.S. Supreme Court found no enforceable private cause of action under § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act.[153] In *Pennhurst*, a resident of a hospital for the care and treatment of the mentally retarded brought a class action lawsuit claiming that her conditions of confinement violated the Developmentally Disabled Assistance and Bill of Rights Act.[154] The Court ruled that this Act did not create individually enforceable rights.[155] The Court's holding limited the ability of beneficiaries of federal grant-in-aid programs to bring a private cause of action against states that allegedly had violated conditions in their grants.[156] In this case, then-Justice William Rehnquist characterized legislation enacted pursuant to the spending power as similar to a contract.[157] In return for a promise to comply with specified conditions, states receive federal funds.[158] Like enforcement of a contract, which requires that the parties have accepted its terms voluntarily and knowingly, enforcement of conditions against a state requires that the state has accepted the conditions voluntarily and knowingly.[159] Justice Rehnquist's opinion, in remanding the case to the Third Circuit for consideration of § 1983, imposed a second requirement that would have to be met before a beneficiary could use § 1983 to enforce conditions in a grant-in-aid statute against a state.[160] Congress must "speak with a clear voice" and manifest an unambiguous intent to create individually enforceable rights.[161]

In a line of cases from *Pennhurst* in 1981 to its 2002 decision in *Gonzaga University v. Doe*, the U.S. Supreme Court clarified, and further narrowed, its approach to determining which types of rights are enforceable under § 1983.[162] In 2002, in *Gonzaga*, the Court resolved a

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[151] *See id.* at 4.

[152] *See id.*; Mank, *supra* note 120, at 1430.

[153] *See* 451 U.S. at 31–32 (1981); Mank, *supra* note 120, at 1434.

[154] 451 U.S. at 6.

[155] *See id.* at 18.

[156] *See id.* at 17–18.

[157] *Id.* at 17.

[158] *Id.*

[159] *See Pennhurst*, 451 U.S. at 17.

[160] *See id.*

[161] *See id.*

[162] *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002); Blessing v. Freestone, 520 U.S. 329, 340–41 (1997).

circuit split in holding that the Family Education Rights and Privacy Act ("FERPA") does not establish individual rights enforceable under § 1983.[163] Writing for the Court, Chief Justice Rehnquist noted that a cause of action under § 1983 requires an unambiguously conferred statutory right, not a vague benefit or interest.[164] He emphasized that previously, the Court had disallowed attempts to infer enforceable rights from Spending Clause statutes.[165] He maintained that the issue of congressional intent controls in both implied right of action and § 1983 cases.[166] Having established a restrictive test for enforceability of federal statutes through § 1983, the *Gonzaga* Court found that FERPA does not establish individual rights.[167] The Court's focus on the absence of rights-creating language, and the requirement, stated isn *Alexander*, that there be evidence in the statute of congressional intent to create both a private right and a private remedy, resulted in the conflation of tests for enforceability under implied private right of action and § 1983.[168]

Plaintiffs recently tried to enforce NCLB under § 1983.[169] In June of 2003, in *Association of Community Organizations for Reform Now v. New York City Department of Education*, the Federal District Court for the Southern District of New York ruled that, by the standards articulated in *Gonzaga*, plaintiffs cannot use § 1983 to enforce NCLB.[170] In *Reform Now*, community organizations and parents brought a class action lawsuit charging that two local school districts and their superintendents had violated NCLB's notice, transfer, and supplemental services provisions.[171] The court in *Reform Now* stated that in *Gonzaga*, the U.S. Supreme Court determined that the first step of the inquiry for deciding whether a statute creates an implied private right of action is the same as the analysis for determining whether the statute is enforceable under

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[163] 536 U.S. at 276, 278. This decision limited use of § 1983 to instances where plaintiffs can demonstrate that there is clear and unambiguous evidence of Congress's intent to establish individual rights on behalf of the plaintiff and those similarly situated. *See* Mank, *supra* note 120, at 1421.

[164] *See Gonzaga*, 536 U.S. at 280.

[165] *Id.* at 281.

[166] *See id.* at 283 (asserting that implied private right of action and § 1983 cases are not distinct from each other).

[167] *See id.* at 287.

[168] *See id.* at 283, 284, 285–86; *Alexander*, 532 U.S. at 286; *see also Gonzaga*, 536 U.S. at 297 (Stevens, J., dissenting) (indicating that the rights-creating language required by the Court for a § 1983 claim has previously been used only for implied private rights of action cases).

[169] *See* Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ., 269 F. Supp. 2d 338, 339 (S.D.N.Y. 2003).

[170] *See id.* at 347.

[171] *See id.* at 342.

§ 1983.[172] Finding no explicit rights-creating language and no clear and unambiguous congressional intent in NCLB to create individually enforceable rights with respect to the notice, transfer, or supplemental educational service provisions of the Act, the court granted the defendants' motion to dismiss.[173] In light of this decision, plaintiffs seeking to enforce the provisions of NCLB may have to explore other legal theories.[174]

C. *The Evolution and Use of Third-Party Beneficiary Theory*

The Court's characterization in 1981 in *Pennhurst* of legislation enacted pursuant to Congress's spending power as similar to a contract has important ramifications for beneficiaries who attempt to enforce the conditions of these statutes.[175] The Court in *Pennhurst* stated that Congress may establish conditions when it disburses federal money to the states.[176] As long as these conditions are clear so that states know the consequences of their commitment, they may be bound by their voluntary assent to comply with these terms, rather than forgo the benefits of federal funding.[177] The legitimacy of Congress's spending power legislation, which imposes conditions on grants of federal money, thus depends on whether the state assents voluntarily and knowingly to the terms of the "contract."[178] Applying its reasoning to the facts of the case, the Court held that the Disabled Assistance and Bill of Rights Act does not impose such a binding obligation on the states.[179] The Court found that the plain language of the statute emphasized a purpose to assist the states rather than to create new substantive rights.[180] It also found that because Congress did not appear to grant sufficient money to defray the costs of the obligations imposed by the statute, it must have had a limited purpose in enacting it.[181]

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[172] *Id.* at 343.

[173] *See id.* at 344, 347.

[174] See *infra* notes 233–309 for further discussion of the application of legal theories for private enforcement of NCLB.

[175] *See Pennhurst*, 451 U.S. at 17; Engdahl, *supra* note 122, at 71–72 (asserting that *Pennhurst*'s characterization of spending conditions as a contract has been affirmed).

[176] 451 U.S. at 17.

[177] *See id.*; *see also* Engdahl, *supra* note 122, at 78–79.

[178] *Pennhurst*, 451 U.S. at 17.

[179] *See id.* at 18.

[180] *See id.*

[181] *See id.* at 24 (noting that when Congress imposes an affirmative obligation on the states, it usually makes a more substantial contribution to defray costs, and noting that for a state to be bound by the conditions imposed by a statute, its potential obligations may not be indeterminate).

In addition to establishing that the parties have entered into a contract voluntarily and knowingly, plaintiffs must establish that they have standing to enforce its terms.[182] Traditionally, only the parties to a contract had the right to enforce it, but contract law has evolved to provide a cause of action for third-party beneficiaries.[183] Because they are not parties to the agreement, those benefited by conditions on federal funding agreements must establish that they are third-party beneficiaries in order to enforce the conditions.[184] Under the *Restatement (Second) of Contracts*, to establish standing as a third-party beneficiary, a party must be an intended beneficiary.[185] The *Second Restatement*'s formulation provides that a party is an intended beneficiary, and thus has rights under a contract, if

> (1) Unless otherwise agreed between promisor and promisee ... recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.[186]

This formulation has had far-reaching consequences for the development of the third-party beneficiary rule because it has accommodated beneficiaries of federal funding contracts.[187] Beginning with the Civil Rights Act of 1964, the recipient's compliance with a federal statute has often been a condition for federal funding of public pro-

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[182] *See* Waters, *supra* note 127, at 1188.

[183] *See* Lawrence v. Fox, 20 N.Y. 268, 275 (1859). *Fox* was the first case to hold that a third party may enforce a contractual obligation made for the plaintiff's benefit. *See* Waters, *supra* note 127, at 1115. Waters describes the third-party rule as a merger between contract and quasi-contract. *See id.*

[184] *See* Waters, *supra* note 127, at 1176, 1187–88.

[185] *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

[186] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302 (also defining an incidental beneficiary, who does not have rights under a contract, as "a beneficiary who is not an intended beneficiary"). The *Second Restatement* modified the *First Restatement*'s formulation of the third-party beneficiary rule, which had defined "donee" and "creditor" beneficiaries, and prohibited recovery under a contract by incidental beneficiaries—those who were neither donee nor creditor beneficiaries. *See id.*; RESTATEMENT (FIRST) OF CONTRACTS § 133 (1932).

[187] *See* Waters, *supra* note 127, at 1172, 1206–07 (characterizing accommodation of these beneficiaries as consonant with the broad equitable principles informing the rule).

grams.[188] Because each statute defines the class that the program intends to benefit, where federal funding calls for compliance with a statute, the class of intended beneficiaries appears to be the same as the intended beneficiaries of the contract.[189] This is so whether or not they have a right to enforce the statute directly.[190]

The *Second Restatement* contains a rule dealing with third-party beneficiary claims based on government contracts.[191] According to subsection 313(1), the third-party beneficiary rule applies to contracts with the government or government agencies, except where applying the rule to such contracts is inconsistent with the policy of the law creating the contract.[192] The comment to section 313 suggests that this formulation "leaves room for the weighing of considerations peculiar to particular situations."[193] Subsection 313(2) provides that a promisor who contracts with the government to render a public service is protected from contractual liability to the general public for consequential damages unless the terms of the promise provide for such liability or a direct action is consistent with the terms of the contract and the policy behind it.[194] Illustrations of contracts between promisors and the government include contracts to carry mail and to maintain a certain water pressure at hydrants on city streets.[195] Despite the existence of section 313 governing contracts with a government or governmental agency, many courts allowing recovery by third-party beneficiaries of public programs have not discussed it.[196] This may be because the comments and examples accompanying the text of section 313, as well as the policy behind it, appear to deal with commer-

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[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313 (applying the third-party beneficiary rule to contracts with a government or governmental agency). See the text accompanying *supra* note 186 for the language of the third-party beneficiary rule.

[192] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313(1).

[193] *Id.* § 313 cmt. a.

[194] *See id.* § 313(2).

[195] *See id.* § 313 cmt. a, illus. 1–2. Beneficiaries of these types of contracts frequently seek to recover damages for harm caused by their reliance on a promise. Waters, *supra* note 127, at 1198–99, 1204–05; *see also* H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897–98 (N.Y. 1928) (concluding that in a lawsuit brought by resident of City of Rensselaer against owner of company that had promised to supply water to fire hydrants at a specified pressure, plaintiff was not an intended beneficiary, in part because use of the third-party beneficiary doctrine in this context could have imposed a crushing financial burden).

[196] *See* Waters, *supra* note 127, at 1201.

cial contracts with the government.[197] Benefits conferred on third parties by statutory schemes, in contrast, are outside of the commercial realm.[198]

Third-party beneficiary claims have succeeded in the courts to enforce conditions of federal funding statutes.[199] In 1967, in *Bossier Parish School Board v. Lemon*, the Fifth Circuit Court of Appeals invoked third-party beneficiary theory to hold a school board accountable for a promise it had made in exchange for federal funding.[200] The court held that where a school board had made assurances under the Civil Rights Act of 1964 that it would admit both African-American and white children on equal terms to schools for children of military base personnel, these assurances constituted a contractual agreement.[201] By agreeing to abide by the terms of the Civil Rights Act, the defendants had assured these children rights as third-party beneficiaries.[202] By accepting the contract and the federal funds it brought, the school board was thus estopped from denying the plaintiffs, African-American children, attendance at these schools.[203]

In 1977, in *Fuzie v. Manor Care, Inc.*, the Federal District Court for the Northern District of Ohio denied the defendant's motion to dismiss the plaintiff's third-party beneficiary claim under the Medicaid Act.[204] The plaintiff, a Medicaid recipient living at a private nursing home operated by the defendant, brought suit to enforce the provisions of Medicaid regulations.[205] Although she could invoke neither an implied private right of action nor § 1983 to enforce her rights, as a Medicaid recipient, she was nevertheless a third-party beneficiary of the statute.[206]

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[197] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313; Waters, *supra* note 127, at 1201.

[198] *See* Waters, *supra* note 127, at 1201–02, 1204–05.

[199] *See Bossier Parish*, 370 F.2d at 852; Fuzie v. Manor Care, Inc., 461 F. Supp. 689, 697, 701 (N.D. Ohio 1977).

[200] *See* 370 F.2d at 850.

[201] *See id.*

[202] *See id.* (characterizing acceptance of funds as further ratification of the contract).

[203] *See id.*; *see also* Waters, *supra* note 127, at 1184 (characterizing *Bossier Parish* as an early civil rights case that vindicated both statutory and constitutional rights through the use of the third-party beneficiary rule).

[204] *See* 461 F. Supp. at 701.

[205] *Id.* at 691.

[206] *See id.* at 697, 701. Waters asserts that third-party beneficiary claims are equivalent to the first prong of the *Cort* test that the Court uses in evaluating implied private right of action claims. *See* Waters, *supra* note 127, at 1174. Unlike a private right of action plaintiff, a third-party beneficiary claimant need only establish membership in the class for whose special benefit Congress enacted the federal statute. *Id.*

In the past, when plaintiffs brought lawsuits alleging both implied private rights of action and third-party beneficiary contract claims, courts did not often reach the latter because they allowed recovery under the former.[207] In evaluating claims under implied private right and § 1983 causes of action, the U.S. Supreme Court has indicated frequently that plaintiffs are intended beneficiaries of statutory schemes.[208] In 1990, in *Wilder v. Virginia Hospital Ass'n*, the Court determined that plaintiff hospitals had a private right of action to enforce benefits conferred by the Medicaid program.[209] In its holding, the Court noted that healthcare providers are undoubtedly intended beneficiaries of the Boren Amendment because it is phrased in terms of benefiting them.[210]

In 1997, in *Blessing v. Freestone*, the Court determined that custodial mothers do not have an enforceable right under § 1983 to have the state's program achieve "substantial compliance" with the requirements of Title IV-D of the Social Security Act.[211] In its decision, the Court left open the possibility that some provisions of Title IV-D might give rise to individual rights.[212] It found only that the plaintiffs had not articulated—and lower courts had not evaluated—a well-defined right.[213] Although the Court did not address explicitly a third-party beneficiary contract claim in *Wilder* or in *Blessing*, its language may provide guidance for plaintiffs seeking to bring such claims as beneficiaries of public programs.[214]

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[207] *See* Waters, *supra* note 127, at 1181.

[208] *See, e.g.*, Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 510 (1990); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 104, 109 (1989) (finding that applicant for renewal of taxicab franchise was intended beneficiary of statutory scheme under National Labor Relations Act).

[209] *See Wilder*, 496 U.S. at 510.

[210] *See id.* The Court also noted that (1) Medicaid is a voluntary program in which states may choose to participate; (2) Congress enacted the Medicaid Act in 1965 and passed the Boren Amendment in response to problems it perceived; and (3) there is a right enforceable by healthcare providers under § 1983. *See id.* at 502, 505–06, 509.

[211] *See Blessing*, 520 U.S. at 332–33.

[212] *See id.* at 345. *Cf.* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 419, 421–22, 430 (1987) (holding that tenants of public housing projects had a right to have utility costs included within a rental payment capped by federal housing legislation).

[213] *See Blessing*, 520 U.S. at 342–43.

[214] *See id.* at 345; *Wilder*, 496 U.S. at 509–10.

IV. The Impact of No Child Left Behind on Educational Equity

This Part of the Note explores the various ways in which NCLB holds promise for advocates of educational equity.[215] First, section IV.A discusses the use of NCLB to strengthen existing constitutional and common-law causes of action.[216] Second, section IV.B analyzes the viability of various tools for enforcement of NCLB.[217] Subsections IV.B.1 and IV.B.2 suggest that it is unlikely that a court will allow beneficiaries of NCLB to enforce the Act under an implied private right of action or a § 1983 theory.[218] Finally, subsection IV.B.3 argues that third-party beneficiary theory is the most promising tool for enforcement of NCLB and lays out the framework required to bring such a claim.[219]

A. *Using No Child Left Behind to Strengthen Existing Causes of Action*

Plaintiffs may be able to use NCLB to fill in the gaps that have prevented their constitutional and common-law claims from succeeding thus far.[220] For example, the NCLB requirement that all students in all schools meet proficiency on state assessments by 2014 may strengthen constitutional claims premised on state guarantees of adequate education.[221] States must determine whether schools are making adequate yearly progress ("AYP") toward this goal, and identify schools failing to do so.[222] Such identification strengthens claims by students attending these schools that they are being deprived of an adequate education.[223] Educational malpractice plaintiffs may be able to overcome courts' resistance to find a duty of care owed to students by focusing on the requirements NCLB imposes on districts and states.[224] Courts could rely on the standards established by NCLB, as well as the statute's focus on

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[215] See *infra* notes 221–225, 259–309, and accompanying text for further discussion of the ways in which NCLB may improve education.

[216] *See infra* notes 220–225 and accompanying text.

[217] *See infra* notes 226–309 and accompanying text.

[218] *See infra* notes 233–257 and accompanying text.

[219] *See infra* notes 258–309 and accompanying text.

[220] *See infra* notes 221–225 and accompanying text.

[221] *See* 20 U.S.C. § 6311(b)(2)(F) (2002). See *supra* notes 27–38 and accompanying text for discussion of constitutional claims.

[222] *See* 20 U.S.C. § 6316(b)(1)(A).

[223] *See id.* See *supra* notes 27–38 and accompanying text for discussion of constitutional claims. A detailed exploration of this theory is beyond the scope of this Note.

[224] See *supra* notes 39–49 and accompanying text for a discussion of educational malpractice claims and *supra* notes 66–85 for a discussion of the relevant provisions of NCLB. One provision that establishes school districts' duty to students is the requirement that schools provide activities to assist students experiencing difficulty in mastering academic achievement standards. *See* 20 U.S.C. § 6314(b)(1)(I).

accountability, to overcome public policy objections to imposing liability on schools that fail to improve.[225]

B. *Enforcing No Child Left Behind to Improve Education*

NCLB contains several important provisions to improve educational opportunity for at-risk students.[226] The Act reflects the Bush Administration's attempt to hold all school districts and states to high standards.[227] The federal government, however, has not enforced NCLB adequately in the two years since its enactment.[228] Schools that have not met NCLB targets, such as AYP, are not providing the services, such as transfer options and supplemental services, that the Act mandates.[229] States have failed to meet U.S. Department of Education deadlines for submitting lists of underperforming schools.[230] Because the federal government has not yet penalized a state for failing to meet NCLB requirements, advocates for educational equity must prepare for the eventuality that the government will continue not to enforce the Act.[231] To ensure that its intended beneficiaries actually benefit from NCLB, it is important to explore the merits of pursuing private enforcement under each of the theories discussed above as an alternative to federal enforcement.[232]

1. Attempts to Enforce NCLB Under Implied Private Right of Action Theory Will Not Succeed

Under *Cort v. Ash* and its progeny, the U.S. Supreme Court looks for significant evidence that Congress intended to create a private right of action to determine whether a private remedy is implicit in a stat-

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[225] See *supra* notes 52–97 for discussion of NCLB and the policies informing the Act. See *supra* notes 42–49 and accompanying text for discussion of policy reasons cited by courts denying recovery for educational malpractice.

[226] *See, e.g.*, 20 U.S.C. §§ 6311(b)(2)(E)–(H), 6311(b)(3)(C), 6314(b)(1)(I), 6316(b)(1)(E). See *supra* notes 66–85 and accompanying text for further discussion of NCLB's provisions.

[227] *See* 20 U.S.C. § 6301; Statement, *supra* note 52, at 1615. See *supra* notes 52, 63–97 and accompanying text for further discussion of the goals of NCLB.

[228] *See* Leonard, *supra* note 113, at A3; Olson, *supra* note 113, at 1; Toch *supra* note 95, at 15.

[229] *See* Gewertz, *supra* note 113, at 1; Leonard, *supra* note 113, at A3.

[230] *See* Olson, *supra* note 113, at 1.

[231] *See id.*; Toch, *supra* note 95, at 15.

[232] *See* Olson, *supra* note 113, at 1.

ute.[233] In 2001, in *Alexander v. Sandoval*, the Court limited its search for Congress's intent to the text and structure of the statute.[234] To enforce NCLB under an implied private right of action theory, therefore, a court would have to find from a statute's text and structure that Congress intended to create both a private right and a private remedy.[235]

NCLB provides options for parents of children attending persistently failing schools.[236] They may, for example, transfer their children out of these schools or opt for free supplemental services.[237] These and other provisions may be seen as creating rights or benefits, but it is unlikely that a court would find that the text and structure of NCLB demonstrate a congressional intent to create a private remedy.[238] In *Alexander*, the Court stated that Congress has not demonstrated an intent to create a private remedy where a statute's language is directed to the federal agencies distributing federal funds, and the statute empowers agencies to enforce their regulations by terminating funding.[239] Under this test, NCLB fails to demonstrate a congressional intent to create a private remedy.[240] In the wake of *Alexander*, advocates for educational equity would not be able to enforce the benefits conferred by NCLB under an implied right of action theory.[241]

2. Attempts to Enforce NCLB Under § 1983 Will Not Succeed

Between 1980 and 2002, a number of plaintiffs used § 1983 successfully to enforce benefits conferred by statutes.[242] The U.S. Supreme

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[233] *See* 422 U.S. 66, 78 (1975); *see, e.g.*, Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13, 14 (1981); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 18 (1981). See *supra* notes 128–145 and accompanying text for further discussion of implied private right of action.

[234] *See* 532 U.S. 275, 288 (2001).

[235] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979). See *supra* notes 128–145 and accompanying text for further discussion of implied private right of action analysis.

[236] *See, e.g.*, 20 U.S.C. § 6316(b)(1)(E), (b)(6), (e) (2002).

[237] *See, e.g., id.* § 6316(b)(1)(E), (b)(8)–(10), (e). See *supra* notes 67–85 and accompanying text for additional provisions of NCLB that may be interpreted as providing rights to children and their parents.

[238] *See, e.g.*, *Alexander*, 532 U.S. at 286, 293; *Sea Clammers*, 453 U.S. at 13, 14; *Pennhurst*, 451 U.S. at 18.

[239] *See* 532 U.S. at 289.

[240] *See id.*

[241] *See id.* at 288–89. See *infra* notes 242–257 and accompanying text for further discussion of NCLB's failure to meet *Alexander*'s narrow test as adopted in *Gonzaga University v. Doe*, 536 U.S. 273, 286 (2002).

[242] *See, e.g.*, Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 524 (1990); Maine v. Thiboutot, 448 U.S. 1, 4 (1980). See *supra* notes 149–162 and accompanying text for discussion of the

Court's 2002 decision in *Gonzaga University v. Doe*, however, made recovery under § 1983 more difficult.[243] The Court in *Gonzaga* focused on rights-creating language and required that there be evidence in the statute of congressional intent to create both a private right and a private remedy.[244] In doing so, the *Gonzaga* decision conflated the tests for enforceability under implied right of action and § 1983.[245]

It is unlikely that a § 1983 action to enforce NCLB would succeed under the Court's current analytical framework, as refined in *Gonzaga*.[246] One court has already ruled that NCLB is not enforceable under § 1983.[247] In 2003, in *Association of Community Organizations for Reform Now v. New York City Department of Education*, the Federal District Court for the Southern District of New York granted the defendants' motion to dismiss the plaintiffs' § 1983 claim.[248] Utilizing the *Gonzaga* standard, the court found that NCLB contains no explicit rights-creating language and no clear and unambiguous congressional intent to create individually enforceable rights.[249] *Reform Now* addressed the notice, transfer, and supplemental educational service provisions of NCLB.[250] The court did not discuss NCLB's legislative history, but instead based its decision on the text and structure of the Act.[251] This

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Court's use of this theory. During this time, NCLB plaintiffs probably would have been able to meet the Court's § 1983 test by showing that Congress intended that specific NCLB provisions benefit them, that their right was neither too vague nor too amorphous to be judicially enforceable, and that the statute unambiguously imposed a binding obligation on the states. *See* Blessing v. Freestone, 520 U.S. 329, 340–41 (1997).

[243] *See* 536 U.S. at 286. See *supra* notes 163–168 and accompanying text, and *infra* notes 244–257 and accompanying text, for further discussion of this case and its impact on § 1983 jurisprudence.

[244] *See* 536 U.S. at 283, 284, 286.

[245] *See id.* at 297 (Stevens, J., dissenting).

[246] *See id.* at 286; Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ., 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003). See *supra* notes 162–168 for further discussion of the Court's narrowing interpretation of § 1983.

[247] *Reform Now*, 269 F. Supp. 2d at 347.

[248] *See id.*

[249] *See id.* at 343, 347 (stating that after *Gonzaga*, the first step of the inquiry for deciding whether a statute creates an implied private right of action is the same as the analysis for determining whether the statute is enforceable through § 1983).

[250] *See id.* at 342. See *supra* notes 76–79 and accompanying text for further discussion of these provisions.

[251] *See Reform Now*, 269 F. Supp. 2d at 347. The Court in *Gonzaga* stated that the focus of the inquiry is whether Congress intended to confer individual rights upon a class of beneficiaries. 536 U.S. at 285–86. After citing several cases, and without explicitly holding that the § 1983 inquiry necessarily is confined to the text and structure of a statute, the Court indicated that where the text and structure of a statute do not demonstrate that Congress intends to create new individual rights, there is no basis for a private suit under implied private right of action or § 1983. *See id.*

approach is consistent with the U.S. Supreme Court's holding in *Alexander* that a court must limit its search for congressional intent to the text and structure of a statute.[252] Therefore, it is unlikely that future plaintiffs would be able to rely on the legislative history of NCLB for evidence of clear and unambiguous congressional intent to create individually enforceable rights.[253]

Like *Alexander*, *Gonzaga* harms the intended beneficiaries of federal grant-in-aid programs.[254] By demanding proof of Congress's intent to provide both a right and a remedy to individuals, and by focusing narrowly on the text and structure of the statute as evidence of intent, the U.S. Supreme Court has made it difficult to succeed in an implied private cause of action.[255] *Gonzaga*'s requirement that plaintiffs demonstrate congressional intent to create both a right and a remedy similarly limits the potential for success of intended beneficiaries of statutes suing under § 1983.[256] NCLB plaintiffs will have to look to other legal theories to ensure that they receive the benefits conferred by the statute.[257]

3. Plaintiffs Should Seek to Enforce NCLB Under Third-Party Beneficiary Theory

The most promising theory of enforcement for NCLB is third-party beneficiary theory.[258] To recover under this theory, a plaintiff must demonstrate that a contract exists between the parties and that the promisee intended that the contract benefit the plaintiff.[259] Where, as here, one party to the contract is a government, the plaintiff also must establish that allowing recovery would not contravene the policy of the law authorizing the contract.[260]

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[252] *See* 532 U.S. at 288.

[253] *See id.* See *supra* notes 86–107 for a discussion of NCLB's legislative history.

[254] *See Gonzaga*, 536 U.S. at 286; *Alexander*, 532 U.S. at 288; Mank, *supra* note 120, at 1480.

[255] *See Alexander*, 532 U.S. at 288; *Reform Now*, 269 F. Supp. 2d at 343, 347; Mank, *supra* note 120, at 1481.

[256] *See Gonzaga*, 536 U.S. at 286; *Reform Now*, 269 F. Supp. 2d at 343, 347; Mank, *supra* note 120, at 1481.

[257] See *supra* notes 233–256 for further discussion of the likely failure of both private right of action and § 1983 as theories of enforcement.

[258] See *infra* notes 259–309 and accompanying text.

[259] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302. See *supra* notes 183–214 and accompanying text for further discussion of this theory and its application to federal funding contracts.

[260] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313.

a. *Establishing the Existence of a Contract*

To argue that this theory applies to a statute that Congress passed under its spending power, plaintiffs should emphasize the words of the U.S. Supreme Court in the 1981 case, *Pennhurst State School & Hospital v. Halderman*.[261] In *Pennhurst*, then-Justice Rehnquist stated that legislation enacted pursuant to Congress's spending power is similar to a contract.[262] Like the terms of a contract, conditions imposed by acceptance of federal funding will only bind a state if it accepts them voluntarily and knowingly.[263] In *Pennhurst*, the Court held that the terms of the Disabled Assistance and Bill of Rights Act do not meet this test.[264] The statute's plain language emphasizes a purpose to assist the states, rather than the disabled, and Congress did not appear to grant sufficient money to defray the costs of imposing a significant obligation on the states.[265] The terms of the statute could not bind the states because the states were unaware of the scope of their obligations.[266]

The plain language of NCLB, unlike that of the statute in *Pennhurst*, states a purpose to provide benefits in that it aims to ensure educational opportunity for all children.[267] The terms of NCLB specify, in detail, the obligations that states must assume in exchange for federal funding.[268] Although some opponents of NCLB argue that Congress has not funded the statute at levels to enable the states to meet all of the obligations imposed by the statute, others, including the President, have proclaimed publicly that sufficient federal dollars are attached to NCLB's mandates.[269] Furthermore, when Congress passed NCLB and states agreed to its conditions in exchange for federal funding, they

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[261] *See* 451 U.S. at 17.

[262] *See id.*

[263] *See id.*; *see also* Engdahl, *supra* note 122, at 78.

[264] *See* 451 U.S. at 17–18.

[265] *See id.* at 17–18, 24.

[266] *See id.* See *supra* note 181 and accompanying text for further discussion of the Court's decision in *Pennhurst* regarding requirements that statutory conditions must meet in order to bind a state.

[267] *Compare* 20 U.S.C. § 6301 (2002), *with Pennhurst*, 451 U.S. at 18. See *supra* notes 63–65, 86–89 and accompanying text for further discussion of NCLB's purpose clause.

[268] *See, e.g.*, 20 U.S.C. §§ 6311(b)(3)(A)–(C), 6311(b)(2)(E)–(H), 6316. See *supra* notes 66–85 and accompanying text for further discussion of NCLB's provisions.

[269] *Compare* 149 CONG. REC. H3766 (daily ed. May 8, 2003) (statement of Rep. Etheridge), *and* NEA, *supra* note 102 (asserting that the bill is continually being underfunded), *with* H.R. REP. No. 107-063, *supra* note 91, at 1242, *and* SPENDING, *supra* note 97 (asserting that NCLB is adequately funded and represents a significant increase in federal funding of education reform).

were well aware of the obligations the Act imposes.[270] For example, provisions of the Act such as the requirement that schools make adequate yearly progress, and the obligation to provide parents of students at schools that have failed to do so with notice and the option to transfer or to receive supplemental services, are stated in clear language.[271] These provisions do not pose an indeterminate obligation on a school that fails to make adequate yearly progress nor a state, which must ensure that the school complies.[272] NCLB appears to meet the guidelines imposed by the *Pennhurst* Court.[273] The Court in *Pennhurst*, however, did not address a third-party beneficiary claim directly.[274]

b. *Establishing Standing*

In addition to meeting the *Pennhurst* guidelines, to enforce a federal funding agreement under a third-party beneficiary theory, plaintiffs must establish standing as third-party beneficiaries.[275] Under the *Second Restatement*, in order to establish standing, third-party beneficiaries must be intended beneficiaries, that is, the funding program must be intended to benefit them.[276] Plaintiffs seeking to recover as third-party beneficiaries of a contract with the government must also demonstrate that application of the third-party beneficiary rule does not contravene the policy of the law authorizing the contract, as provided by section 313 of the *Second Restatement of Contracts*.[277] It has been suggested that section 313 applies only to commercial claims because it specifically mentions consequential damages, rather than injunctions, and because its illustrations all refer to commercial contracts.[278] Beneficiaries of commercial contracts frequently seek to recover dam-

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[270] See *supra* notes 66–85 and accompanying text for evidence that NCLB describes, in detail, the obligations of states under the Act.

[271] *See, e.g.*, 20 U.S.C. § 6316(b)(1)(E), (b)(6), (b)(8)(ii), (e). See *supra* notes 76–79 and accompanying text for further discussion of these provisions.

[272] *See* 20. U.S.C. § 6316(b)(1)(E), (b)(6), (b)(8)(ii), (e). See *supra* notes 76–79 and accompanying text for further discussion of these provisions.

[273] *See* 451 U.S. at 17–18. See *supra* notes 176–181 and accompanying text for further discussion of the *Pennhurst* guidelines.

[274] *See* 451 U.S. at 17–18, 32.

[275] *See* Waters, *supra* note 127, at 1176, 1187–88.

[276] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302. See *supra* note 186 and accompanying text for further discussion of the *Second Restatement*'s intended beneficiary formulation.

[277] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313(1).

[278] *See id.* § 313; Waters, *supra* note 127, at 1201.

ages based on harm caused by their reliance on a promise.[279] The remedy sought in cases involving beneficiaries of public programs, in comparison, seeks to achieve the objective of the statute through an injunction, frequently resembling specific performance.[280] In contrast to potential claims by members of the general public in the commercial context, statutes define an identifiable group for whose benefit the federal government has imposed an obligation on the defendant.[281]

Because it does not contravene the policy behind a statute conferring benefits upon a particular group to permit members of that group to seek enforcement of the statute, section 313 does not preclude application of the third-party beneficiary rule to public programs established by a contract with the government.[282] Furthermore, this use of the third-party beneficiary rule is consonant with broad, equitable principles allowing recovery by individuals who were not parties to the contract, but for whose benefit the contract was enacted.[283] Where defendants receive federal funds intended to be used for plaintiffs' benefit but fail to provide the intended benefits, the third- party beneficiary rule should be invoked to prohibit unjust enrichment.[284] Unlike implied private right of action theory, which limits its consideration of intent to benefit to the text and structure of a statute, third-party beneficiary theory is consistent with a broader reading of statutory intent.[285] From its origins, as demonstrated by its focus on the party intended to benefit from a contract, this theory is premised on equitable principles and aims to prohibit unjust enrichment.[286] Consistent with this purpose, a court would be able to look to a statute's legislative history to determine congressional intent.[287]

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[279] *See* Waters, *supra* note 127, at 1204–05; *see also* H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 899 (N.Y. 1928).

[280] *See* Waters, *supra* note 127, at 1204–05.

[281] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313; Waters, *supra* note 127, at 1204–05.

[282] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313; Waters, *supra* note 127, at 1204–05.

[283] *See* Waters, *supra* note 127, at 1206–07.

[284] *See id.*

[285] *See id.*

[286] *See id.* (discussing Lawrence v. Fox, 20 N.Y. 268 (1859)).

[287] *See id.*

c. *Establishing Intent to Benefit a Particular Class*

The legislative history of NCLB reveals that its purpose is to improve educational opportunity for all children.[288] NCLB aims to target funds to needy communities.[289] It aims to inform parents about the quality of their local schools as well as about their options to transfer their children out of failing schools or to receive supplemental services.[290] NCLB requires that parents be involved in a meaningful way in planning and implementing all programs assisted by the Act.[291] Under NCLB, schools must identify and assist struggling students.[292] The text and legislative history of the statute reveal that NCLB confers these benefits—and others—upon students and their parents, consistent with the broader purpose of the statute to improve educational opportunity for the neediest students.[293]

Although the Federal District Court for the Southern District of New York in *Reform Now* found that the text and structure of NCLB did not evince congressional intent to create individually enforceable rights, a court evaluating a third-party beneficiary claim would not be limited, as was the *Reform Now* court, by the U.S. Supreme Court's § 1983 jurisprudence.[294] Third-party beneficiary theory aims to effectuate the intentions of the parties.[295] Inquiry into parties' intentions is not limited to the text and structure of the agreement, but rather focuses on what the circumstances indicate about the promisee's intentions.[296] The legislative history of NCLB would assist a court in determining that the federal government intended that the neediest students benefit from NCLB.[297]

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[288] *See* 20 U.S.C. § 6301 (2002); 149 CONG. REC. S194 (daily ed. Jan. 10, 2003) (statement of Sen. Gregg); Press Release, *supra* note 87.

[289] *See* 20 U.S.C. § 6301; Payne, *supra* note 88, at 315–16.

[290] *See* 20 U.S.C. § 6316(b)(1)(E), (b)(6), (b)(8)(ii); Payne, *supra* note 88, at 321; BOEHNER & GREGG, *supra* note 94, at 6.

[291] *See* 20 U.S.C. § 6318(a)(2)–(d); *see also* Payne, *supra* note 88, at 322; BOEHNER & GREGG, *supra* note 94, at 6.

[292] 20 U.S.C. § 6314(b)(1)(I).

[293] *See, e.g.*, *id.* §§ 6301, 6314(b)(1)(I), 6316(b)(1)(E), 6316(b)(6), 6316(b)(11), 6316(b)(8)(ii), 6316(e). See *supra* notes 63–97 and accompanying text for further discussion of NCLB's purpose.

[294] *See* 269 F. Supp. 2d at 344.

[295] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302.

[296] *See id.*

[297] See *supra* notes 63–65, 86–97 and accompanying text for further discussion of the ways in which the White House and members of Congress have characterized the purposes of NCLB. The *Second Restatement of Contracts* provides that a party is an intended beneficiary, and can therefore recover as a third-party beneficiary, if recognition of the beneficiary's right to performance is appropriate to effectuate the parties' intention and

Once a court establishes that the parties to the agreement intended to give a particular class of people the benefit of the agreement, the inquiry need go no further.[298] It would be easier for the beneficiaries of NCLB—disadvantaged children and their parents—to recover under this theory than under implied private right of action or § 1983.[299] Not much case law exists to guide plaintiffs or courts, as third-party beneficiary theory remains largely untested as a theory of recovery for the beneficiaries of statutory schemes.[300] This is largely because, where plaintiffs have included contract claims, courts often have allowed recovery under implied private rights of action and, hence, have not reached the contract claims.[301]

d. *Drawing on Precedent*

Two cases that courts decided before plaintiffs first succeeded in using § 1983 to enforce statutory rights suggest that beneficiaries of conditions on federal funding may use third-party beneficiary theory to ensure that they receive promised benefits.[302] In 1967, in *Bossier Parish School Board v. Lemon*, the Fifth Circuit Court of Appeals held a school board accountable for providing African-American children with the benefits it had assured them by accepting funds under the Civil Rights Act of 1964.[303] In 1977, in *Fuzie v. Manor Care, Inc.*, the Federal District Court for the Northern District of Ohio ruled that a plaintiff who could invoke neither implied private right of action nor § 1983 to enforce her rights under the Medicaid Act was nevertheless a third-party beneficiary of the statute.[304] Furthermore, even where courts have not addressed third-party beneficiary claims directly, dicta

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circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302.

[298] *See* Waters, *supra* note 127, at 1174. See *supra* note 206 and accompanying text for discussion of Waters's assertion that a third-party beneficiary claimant need only establish membership in the class for whose special benefit Congress enacted the federal statute.

[299] *Compare supra* note 185 and accompanying text (outlining requirements of third-party beneficiary standing), *with supra* notes 137–144 (outlining current requirements of implied private right of action), *and supra* notes 166–168 (discussing current requirements of § 1983).

[300] *See* Waters, *supra* note 127, at 1181.

[301] *See id.*

[302] *See* Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 850 (5th Cir. 1967); Fuzie v. Manor Care, Inc., 461 F. Supp. 689, 701 (N.D. Ohio 1977).

[303] *See* 370 F.2d at 850.

[304] *See* 461 F. Supp. at 701.

in some cases suggest that courts might consider this theory to vindicate rights that are well defined, such as those in NCLB.[305]

Plaintiffs seeking to enforce NCLB to receive the benefits that the Act confers upon them can build upon precedent to bring third-party beneficiary claims to court.[306] They can rely on earlier cases that address third-party beneficiary claims directly, such as *Bossier Parish* and *Fuzie*.[307] They can rely also on cases that address elements of third-party beneficiary claims in decisions based on implied private right of action or § 1983.[308] Given the broad purpose of third-party beneficiary theory, which is informed by equitable principles and aims to prohibit unjust enrichment, this theory holds promise for plaintiffs seeking to enforce NCLB to promote educational equity.[309]

Conclusion

Fifty years after *Brown v. Board of Education*, poor and minority children still are deprived of educational opportunity. Years of both litigation and legislation have not accomplished educational equity. The passage of the No Child Left Behind Act of 2001 holds promise in that it provides important benefits for children. Thus far, however, the federal government has not acted adequately to enforce NCLB. Schools and states that fail to make adequate yearly progress continue to receive money under NCLB, but they fail to meet the obligations to children and parents that the Act imposes. To protect the benefits NCLB confers upon them, it is essential that parents of children attending these failing schools explore their options for private enforcement. Given the U.S. Supreme Court's decisions within the past three years narrowing implied private right of action and § 1983, neither will be available to plaintiffs pursuing educational adequacy. The most promising theory for enforcement of NCLB is third-party beneficiary theory.

To succeed in enforcing NCLB under a third-party beneficiary theory, plaintiffs should focus on similarities between federal funding agreements and contracts, the text and legislative history of NCLB

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[305] *See Blessing*, 520 U.S. at 345 (declining to foreclose the possibility that a well-defined right might be enforceable); *Pennhurst*, 451 U.S. at 17 (characterizing funding agreements as similar to contracts and specifying requirements they must meet to bind states).

[306] *See Bossier Parish*, 370 F.2d at 852; *Fuzie*, 461 F. Supp. at 701.

[307] *See Bossier Parish*, 370 F.2d at 850; *Fuzie*, 461 F. Supp. at 701.

[308] *See, e.g.*, *Blessing*, 520 U.S. at 345; *Wilder*, 496 U.S. at 502, 509–510; *Pennhurst*, 451 U.S. at 17.

[309] *See* 20 U.S.C. § 6301 (2002); Restatement (Second) of Contracts, *supra* note 185, § 302; Waters, *supra* note 127, at 1206–07.

that demonstrate an intent to benefit children by providing them with opportunities to obtain a high-quality education, and the equitable principles informing third-party beneficiary theory. Advocates for educational equity must prepare to challenge states to provide the quality education for all students that they agreed to when they began accepting NCLB funds two years ago.

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